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No. 90-350

Supreme Court, U.S.

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In The  
Supreme Court of the United States  
October Term, 1990

IN RE GERALD J. SANDERFOOT, DEBTOR,  
JEANNE FARREY, f/k/a JEANNE SANDERFOOT,

*Petitioner,*

v.

GERALD J. SANDERFOOT,

*Respondent.*

BRIEF IN OPPOSITION TO PETITION FOR  
WRIT OF CERTIORARI TO THE UNITED STATES  
COURT OF APPEALS FOR THE SEVENTH CIRCUIT

For Respondent,  
GERALD J. SANDERFOOT:

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**QUESTION PRESENTED**

This matter presents a single issue of federal law:

Whether a debtor in a bankruptcy action may, pursuant to 11 USC Sec. 522(f), avoid a lien against homestead real property granted to a former spouse as part of a contested property division in a divorce proceeding.

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ACQUIESCE OF RESPONDENT REGARDING  
CERTAIN OF PETITIONER'S STATEMENTS

Respondent, Gerald J. Sanderfoot, agrees with the Petitioner's statement as to the following:

- A. Opinions Below
- B. Jurisdiction
- C. Federal Statutes Involved
- D. State Statute Involved

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 STATEMENT OF THE CASE

**Nature of the Case:** Respondent agrees with the factual statements of Petitioner regarding the division of authority in the United States Courts of Appeal on the issue presented.

**Statement of Facts:** Respondent agrees with Petitioner's statement of facts, with the following exceptions:

Judgment of divorce and property division was granted by the Circuit Court for Outagamie County, Wisconsin, on September 12, 1986 [See Section 806.06(1)(d), Wisconsin Statutes]. Written Judgment of Divorce was entered on February 5, 1987 [See Section 806.06(1)(b), Wisconsin Statutes]. The Judgment of Divorce terminated the marital relationship of the parties and fixed their respective financial rights as to property division effective September 12, 1986 [See Section 767.37(3), Wisconsin Statutes, and *Brandt v. Brandt*, 145 Wis 2d 394, 421, 427 NW 2d 126, 136 (1988)].

The Petitioner's statement of facts appears to argue that the property division equalizing payment was solely



for the value of the homestead of the parties. Contrary to this position, the lien awarded to Petitioner was based upon the entire marital estate of the parties. See Appendix to Petition for Writ of Certiorari, App. pp. 49a-61a.

Additionally, whether or not Mr. Sanderfoot made all or none of the payments ordered is totally irrelevant to the issue presented.

**Procedural History:** Respondent agrees with Petitioner's statement of procedural history.

**Basis for Federal Jurisdiction:** Respondent agrees with Petitioner's statement.

### REASONS FOR DENYING THE WRIT

#### I. WHILE THERE IS AN EVEN DIVISION OF AUTHORITY BETWEEN THE CIRCUIT COURTS OF APPEAL, THE DECISION OF THE SEVENTH CIRCUIT IS BETTER REASONED.

There is no question that the decision of the Seventh Circuit Court of Appeals results in an even division of authority on this issue in the Courts of Appeal that have reviewed the question. The difficulty with Petitioner's position is, however, that the cases represented by *In re Pederson*, 875 F2d 781 (9th Circuit, 1989), are clearly better reasoned.

The attempts of the *Boyd v. Robinson*, 741 F2d 1112 (8th Circuit, 1984), line of cases to which Petitioner subscribes, are convoluted and unpersuasive, relying on several different theories to find that a lien in a contested divorce is not a judicial lien. This line of decisions ignores

the clear and unambiguous language of the Bankruptcy Code.

The Bankruptcy Code defines judicial lien as follows:

11 USC Section 101(32): " 'judicial lien' means a lien obtained by judgment, levy, sequestration or other legal or equitable process or proceeding."

To say that a divorce judgment does not fit that definition totally ignores the clear meaning of the quoted section.

To argue, as Petitioner does, that the lien recognizes some type of pre-existing rights ignores the divorce court's judgment and the provisions of Section 767.37(3), Wisconsin Statutes.

While the waters are muddy, they are muddied by the attempts of some courts to read language into the Bankruptcy Code which is not there. As pointed out by the Seventh Circuit in this case:

"We conclude that *Pederson* and its progeny are better reasoned and faithful to the plain language of Section 522(f)." *Sanderfoot*, 899 F2d at 605, Petitioner's App. at 16a.

#### II. THE SEVENTH CIRCUIT'S DECISION DOES NOT HANDICAP THE STATE DIVORCE COURTS.

Petitioner sets forth the proposition that the uncertainty surrounding the issue presented will severely handicap state divorce courts and invades the province of the states. Petitioner uses too broad a brush.

The Seventh Circuit's decision does no more and no less than recognize that a property division balancing payment is dischargeable in bankruptcy.<sup>1</sup>

The decisions of the Seventh and Ninth Circuits recognize that if the property division payment is dischargeable, to say that the judicial lien which such a judgment imposes is not voidable as to exempt property is, in effect, a right without a remedy. Contrary to Petitioner's statements, these decisions do not affect liens to secure "nondischargeable obligations like child support" (Petitioner's Brief for Writ, at page 15), for 11 USC Sec. 522(c) specifically provides that exemptions do not apply to child support and alimony.

While the decision of the Seventh Circuit may, indeed, make the divorce court's job more difficult, it does not render it impossible, for pursuant to state law, divorce courts are vested with significant discretion in fashioning a reasonable, just and equitable property division, based upon all of the circumstances of the parties. See Section 767.255, Wisconsin Statutes, and, for example, *Popp v. Popp*, 146 Wis 2d 778, 786, 432 NW 2d 600 (1988).

### III. THE DECISION OF THE SEVENTH CIRCUIT CARRIES OUT THE INTENT OF CONGRESS.

Petitioner argues that the Seventh Circuit erred, as a matter of law, by ignoring the intent of Congress. In support of this contention, Petitioner argues that 11 USC

<sup>1</sup> 11 USC Section 523 sets forth exemptions to discharge. While child support and separate maintenance payments are not dischargeable, property division payments clearly are.

Section 522(f) is ambiguous and thus the court must look beyond the language of the statute and even if the language is not ambiguous, congressional intent is relevant where "literal application of a statute will produce a result demonstrably at odds with the intention of the drafters . . ." *United States v. Ron Pair Enterprises, Inc.*, 489 US 235 (1989) at pp. 20-21 of Petitioner's Brief.

The question is, thus, what was the intent of Congress in enacting 11 USC Section 522(f)?

In making such an analysis, the starting point is the applicable law. 11 USC Section 522(f) states, in full:

"(f) Notwithstanding any waiver of exemptions; the debtor may avoid the fixing of a lien on an interest of the debtor in property to the extent that such lien impairs an exemption to which the debtor would have been entitled under subsection (b) on this section; if such lien is -

- (1) a judicial lien; or
- (2) a nonpossessory, nonpurchase money security interest in any -
  - (A) household furnishings, household goods, wearing apparel, appliances, books, animals, crops, musical instruments or jewelry that are held primarily for the personal, family or household use of the debtor or a dependent of the debtor; or
  - (B) implements, professional books or tools of the trade of the debtor or the trade of a dependent of the debtor; or
  - (C) professionally prescribed health aids for the debtor or a dependent of the debtor."

While Section 522(f)(1) is admittedly designed to protect a debtor from a race to the courthouse, neither the language of the statute nor the legislative history places a time limit upon the avoidance right. Thus, a debtor can avoid a judicial lien if it was obtained one week, one year or five years before the filing of bankruptcy if that lien impairs an interest in exempt property. See House Report No. 95-595, 95th Congress 1st Session 362 (1977).

The next issue is what is a judicial lien? That question is answered by the Bankruptcy Code itself in 11 USC Section 101(32):

"(32) 'judicial lien' means lien obtained by judgment, levy, sequestration or other legal or equitable process or proceeding."<sup>2</sup>

To ask the question, as Petitioner does, of whether the term "judicial lien" encompasses liens in a divorce judgment is redundant. If a court renders a judgment in a divorce action and the judgment has a provision for a nonconsensual lien, can it be other than a judicial lien?<sup>3</sup>

Contrary to Petitioner's argument, the judicial lien granted in this case by the divorce court was not granted, "... in exchange for the court's award of the homestead of the debtor." Rather, it was an award of money to

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<sup>2</sup> 11 USC 101(33) defines lien: "(33) 'lien' means a charge against or interest in property to secure payment of a debt or performance of an obligation."

<sup>3</sup> Regarding consensual liens, see 11 USC 101(47) defining "security interest."

equalize the division of a marital estate with gross assets of \$139,920.00 and debts of \$79,319.31.<sup>4</sup>

Petitioner's argument also ignores the code definition of creditor contained in 11 USC 101(9):

"(9) 'creditor' means -

(A) entity that has a claim against the debtor that arose at the time of or before the order for relief concerning the debtor . . . "

Reviewing the sections above referred to, it is clear as to the definitions and meanings of the applicable law. Did Congress intend the result reached by the Seventh and Ninth Circuits? Yes, for Congress did not include in the applicable statutes an exception for a judicial lien in a divorce action.

Nowhere in any brief submitted in this case, either in the Bankruptcy Court, District Court, Circuit Court of Appeals nor the Brief for Writ of Certiorari has Petitioner cited a single word from Congress which would permit the interpretation she seeks.

The purpose of Section 522(f)(1) is to permit a debtor to avoid judgment liens which impair exempt property. The decision of the Seventh Circuit in this case, and the Ninth Circuit in *In re Pederson*, 875 F2d 781 (9th Cir., 1989), are correct in the interpretation and application of the United States Bankruptcy Code to the issue presented.

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<sup>4</sup> Judgment of Divorce, Petitioner's App. pp. 51a to 56a. \$137,829 of assets and \$78,320.21 of debt were awarded to debtor or a net of \$59,508.79.



**CONCLUSION**

The decision of the Seventh Circuit Court of Appeals is correct. The Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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